WILLKIE FARR & GALLAGHER LLP

EX PARTE OR LATE FILED

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

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VIA COURIER

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Federal Communications Commission
Office of the Secretary

EX PARTE

December 3, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

Re: ***Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Docket No. 08-24**

Dear Ms. Dortch:

On behalf of One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc., please find enclosed one redacted original and two redacted copies of a confidential *ex parte* letter for filing in the above-referenced docket. Pursuant to the First Protective Order in this proceeding, an electronic copy of the confidential *ex parte* letter is being sent to Denise Coca and Tim Stelzig of the Wireline Competition Bureau. In addition, one original confidential *ex parte* letter is being filed with the Secretary's Office under separate cover.

Please do not hesitate to contact me if you have any questions with respect to this submission.

Respectfully submitted,

Nirali Patel

Thomas Jones
Nirali Patel

Attorneys for One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc.

Enclosures

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Re: ***Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Docket No. 08-24**

Dear Ms. Dortch:

One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc. (collectively, "Joint Commenters"), through their undersigned counsel, hereby submit this response to arguments made by Verizon New England ("Verizon") in its Reply Comments[1] and its July 1, 2008 *Ex Parte* Letter[2] in the above-captioned proceeding. As discussed herein, Verizon has failed to provide any new evidence in support of its request for forbearance. Accordingly, the Petition[3] must be denied. Furthermore, Verizon has suggested changes to the Commission's forbearance standard that would serve no purpose other than to increase the

[1] Reply Comments of Verizon, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24 (filed May 12, 2008) ("Reply Comments" or "Verizon Reply Comments").

[2] Letter from Nneka Ezenwa, Associate Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24 (filed July 1, 2008) ("July 1, 2008 *Ex Parte* Letter").

[3] Petition of Verizon New England for Forbearance, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island*, WC Dkt. No. 08-24 (filed Feb. 14, 2008) ("Petition").

likelihood that forbearance would be granted. In addition, Verizon has failed to demonstrate why Joint Commenters' proposed changes to that standard should not be adopted.

1. Verizon Has Failed To Justify Its Proposal That The FCC Depart From Using The Geographic Markets It Has Used In Past Forbearance Orders.

In its Reply Comments, Verizon seeks to manipulate the geographic markets used by the Commission in past UNE forbearance proceedings solely to maximize Verizon's chances of receiving forbearance. For example, Verizon maintains (at 4) that analyzing network coverage data on a rate-center, rather than a wire-center, basis is appropriate because: (1) Commission precedent provides that "where competition [i.e., coverage] is fairly uniform across a given geographic area, it is unnecessary to conduct a more granular geographic analysis" and here, "the evidence shows that voice service is already available throughout Rhode Island"; (2) Cox "internally track[s]" its coverage by rate center; and (3) converting rate center data to wire center data is an imprecise process. Each of these arguments is flawed and must be rejected.

First, it is not at all clear that coverage "is fairly uniform across" Rhode Island. The FCC has included both residential and business customer locations in its network coverage threshold test, and at the same time, it has found that most cable operators' networks do not reach major business districts.[4] Verizon's bald statement that Cox's network coverage is "uniform" across all end users in the state is therefore implausible. Moreover, assuming *arguendo* that Verizon's claim that "voice service is already available throughout Rhode Island" is true, it is irrelevant. The FCC has already explicitly rejected the argument that in analyzing petitions for forbearance from unbundling obligations, "appropriate geographic markets should be defined according to where [the incumbent cable operator] has plant that can be used to serve customers.[5] In addition, in the 6-MSA proceeding, Verizon similarly claimed that "Cox already appears to offer voice services throughout virtually all of its franchise territory in the Providence MSA,"[6] but the FCC expressly held that evidence of competitive gains in the residential voice market was not a sufficient basis for forbearance relief. *See 6-MSA Order* n.116.

Second, while Cox may maintain its network coverage data internally on a rate-center basis, as mentioned, Cox provided such data on a wire-center basis in the 6-MSA proceeding and

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[4] *See In re Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, n.116 (2007) ("*6-MSA Order*").

[5] *In re Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 1958, n.54 (2007) ("*Anchorage Order*").

[6] Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Providence Metropolitan Statistical Area, WC Dkt. No. 06-172, at 4 (filed Sept. 6, 2006).

in the Omaha proceeding soon after the FCC requested the information.[7] Moreover, under the Commission's network coverage test, forbearance is granted "*in wire centers* where Cox's voice-enabled cable plant covers at least 75 percent of the end user locations that are accessible *from that wire center.*"[8] Thus, there is no reason for the FCC to depart from its precedent of analyzing network coverage data on a wire-center basis, particularly when Cox has provided such data to the Commission on a wire-center basis in the past.

Third, just because Verizon cannot precisely convert white pages directory listings from a rate-center basis to a wire-center basis[9] does not mean that Cox cannot accurately convert its actual line counts by rate center to line counts by wire center. Indeed, Cox has stated that, "[d]espite Verizon's claims, Cox can and already has provided **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]"[10] As the FCC has repeatedly held, actual competitor line counts are far more reliable than proxies.[11] It follows that the availability of Cox's actual line counts on a wire-center basis should end this dispute.

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[7] *See* Opposition of One Communications Corp., Time Warner Telecom Inc., Integra Telecom, Inc., and Cbeyond, Inc., *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24, at 14 (filed Mar. 28, 2008) ("Opposition").

[8] *See, e.g., In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 62 (2005) ("*Omaha Order*") (emphasis added); *see also Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting Qwest Corporation Forbearance Relief in the Omaha Metropolitan Statistical Area*, Public Notice, 22 FCC Rcd. 13561, DA 07-3376, at 2 (2007) ("*Cable Coverage Threshold Disclosure Public Notice*") (disclosing that Qwest was granted forbearance from unbundling obligations in those wire centers where, among other things, Cox's voice-enabled cable plant covered at least 75 percent of the end-user locations that were accessible from those wire centers).

[9] *See* Verizon Reply Comments, Attachment A, Reply Declaration of Patrick Garzillo ¶ 12 & Exhibit 1 ("Garzillo Reply Decl.") (providing white pages directory listings data for Rhode Island on a wire-center basis with the disclaimer that "the process of assigning directory listings to specific wire centers is necessarily imperfect" so "the Commission instead should rely on the rate center data Verizon provided in Exhibit 5" to its Petition).

[10] Comments of Cox Communications, Inc., *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24, at 3 (filed Mar. 28, 2008) ("Cox Comments").

[11] *See, e.g., 6-MSA Order* n.115 (rejecting Verizon's use of business E911 data as a proxy for actual business line counts and noting that "[i]n both [the *Omaha* and *Anchorage UNE* forbearance] proceedings the Commission relied upon actual line counts submitted by the incumbent LEC and the major cable provider in the market consistent with our approach in this order") (internal citations omitted); *see also id.* n.128 ("[T]he [*Omaha Order*] explicitly found compelling and relied on the actual access line data submitted by the incumbent LEC and the facilities-based cable competitor.").

In addition to seeking to manipulate the geographic market used to assess network coverage, Verizon asserts that the FCC should abandon its use of MSAs as the geographic market for assessing market share. Verizon contends (at 21-24) that the Commission should instead analyze market share data on a statewide basis. This argument is without merit. *First*, in other proceedings, Verizon itself has expressly recognized that:

> MSAs are reasonable geographic zones for the application of regulatory pricing policies. They have well-established boundaries that are available from public sources, they can be mapped to Verizon wire centers and rate centers, and they are specifically designed to capture economic communities of interest.[12]

Here, however, Verizon asserts (at 22) that "[w]hile that is generally correct with respect to most types of competitors, it is not the case for incumbent cable operators, whose networks track local franchise areas." According to Verizon, "the unique situation of cable operators" in this respect and "the centrality of cable in the Commission's forbearance analysis" justifies analyzing competitors' market share on a statewide basis. Verizon Reply Comments at 22 & n.27. But cable operators are not the only competitors that are relevant to the analysis. The Commission has repeatedly held that competition from a single cable competitor is insufficient to justify forbearance from unbundling obligations.[13] This means that forbearance is only justified where non-cable competitors can compete meaningfully and constrain Verizon's prices.[14] As Verizon concedes (at 22), entry by such non-cable competitors is much more likely to occur on an MSA basis (or some approximation thereof) than on a statewide basis. Accordingly, Verizon cannot ignore the fact that the FCC has consistently analyzed competitors' market share—including that of cable operators—on an MSA basis.[15]

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[12] Petition of Verizon New York Inc. For MSA-Specific Pricing Flexibility For Retail Business Services, *Tariff Filing of Verizon New York Inc. to Implement Pricing Flexibility for Non-Basic Services*, New York State Public Service Commission Case 06-C-0897, at 6-7 (filed Sept. 16, 2008); *see also In re Access Charge Reform* et al., Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶ 72 (1999) (holding that "MSAs best reflect the scope of competitive entry, and therefore, are a logical basis for measuring the extent of competition").

[13] *See, e.g., 6-MSA Order* n.113 ("[W]e reject Verizon's suggestion that, in prior orders, the Commission granted forbearance based simply on cable coverage"); *see also Omaha Order* ¶ 71 (holding that "facilities-based competition between Qwest and Cox, *in addition to* the actual and potential competition from established competitors which can rely on [] wholesale access rights" "minimizes the risk of duopoly and coordinated behavior") (emphasis added).

[14] *See, e.g., Anchorage Order* ¶ 46 (explaining that, post-forbearance, "the continuing obligation of ACS to provide unbundled access to loops at rates, terms and conditions under mutually agreeable rates, terms, and conditions . . . with [sic] permit other competitors to enter the market, thereby reducing the risk of anticompetitive conduct").

[15] *See, e.g., In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*,

Second, according to Verizon, opponents should not take issue with its argument that market share should be analyzed on a statewide basis in this proceeding because "the state of Rhode Island is smaller than the Providence MSA," a fact that purportedly "obviates any potential concerns that Verizon might obtain relief for a broader geographic area than the area subject to competition from cable." Verizon Reply Comments at 22. But Verizon's real motivation in seeking relief on this smaller statewide basis is to exclude the Massachusetts portion of the Providence MSA from the forbearance analysis. This is because that geographic area is served by Comcast, not Cox, and, as the Commission has found, Comcast has not yet entered the business market in its territory in the Providence MSA.[16] But excluding a portion of an MSA, comprised of inter-related commercial and residential areas, simply because the level of cable competition is lower in one area than in other parts of the MSA would be equivalent to gerrymandering. Indeed, Verizon has no response to Joint Commenters' argument that its sole reason for seeking to replace the Providence MSA with the state of Rhode Island as the relevant geographic market is to maximize the likelihood it will receive forbearance. This is hardly a basis for the FCC to depart from its precedent of analyzing market share on an MSA basis.

2. Verizon Mischaracterizes The Commission's Network Coverage Test And Has Failed To Demonstrate That It Meets That Test.

Verizon insists that it meets the Commission's network coverage test, which it says "provides relief in every wire center where cable voice services could be made available, within a commercially reasonable time, to 75 percent *of homes* in the wire center." Verizon Reply Comments at 2 (emphasis added). But this is *not* the FCC's test. Rather, the Commission has granted unbundling relief where, among other things, cable plant covers at least 75 percent "*of the end user locations* that are accessible from that wire center." *See, e.g., Omaha Order* ¶ 62 (emphasis added).[17] As Joint Commenters have pointed out, "end users" include both business and residential customer locations, but Verizon has submitted coverage information only for residential customer locations. *See* Opposition at 32. Verizon has no response to Joint

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Memorandum Opinion and Order, 23 FCC Rcd. 11729, ¶ 27 (2008) ("*4-MSA Order*") ("The record evidence does not reflect that *in any of the four MSAs* do the cable operators, even in the aggregate, have more than a [REDACTED] percent share of the market for mass market telephone services *in an MSA*.") (emphasis added); *see also 6-MSA Order* ¶ 37 ("the record evidence indicates that competition from cable operators *in the 6 MSAs* currently does not present a sufficient basis for relief") (emphasis added).

[16] *See 6-MSA Order* n.116 ("Comcast states that its cable networks are primarily in residential areas and to the extent small businesses are in the areas, Comcast does make its services, including voice[,] [available] to those entities in the Boston, Pittsburgh, and Philadelphia MSAs.").

[17] The Wireline Competition Bureau has disclosed that the confidential percentage in paragraph 62 of the *Omaha Order* was 75. *See Cable Coverage Threshold Disclosure Public Notice* at 2.

Commenters' argument. Instead, Verizon (at 3) clings to information on Cox's website[18] and a 2001 Providence newspaper article stating that Cox provides local phone service to "about 95 percent of the state's residents,"[19] as its primary evidence that the network coverage test is satisfied in Rhode Island.[20] Obviously, the category of "residents" does not include businesses, rendering this statement irrelevant. Furthermore, in the *6-MSA Order* (¶ 40) the FCC rejected Verizon's proffer of "materials from competitors' websites describing their . . . territories" as evidence of MSA-wide facilities deployment. The FCC should adopt the same philosophy in this proceeding.

Verizon also emphasizes that, under the *Omaha Order*, the relevant inquiry in the FCC's network coverage test is whether the incumbent cable provider is "capable" or "willing and able within a commercially reasonable time of providing service." *See* Verizon Reply Comments at 17, 19 & n.23 (quoting *Omaha Order* ¶ 69). According to Verizon (at 17), the factors that inform this inquiry include whether Cox is "'actively marketing itself'" to business customers. Accordingly, much of Verizon's "evidence" of competition from Cox for business customers includes printouts from Cox's website.[21] But this is simply not enough. In the *Omaha Order*, the FCC also held that "*requiring that Cox cover at least 75 percent of the end user locations* in a wire center service area" before granting forbearance from unbundling obligations "will ensure that all of the customers capable of being served by Qwest from that wire center will benefit from competitive rates, terms, and conditions." *Omaha Order* ¶ 69 (emphasis added).[22] Thus, in order to meet the Commission's network coverage test *throughout the entire state of Rhode Island*, Verizon must also show that Cox's network covers at least 75 percent of end user locations, including business locations, in every wire center in the state. As mentioned, however, Cox "already has provided **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL][23] in

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[18] *See* Petition at 7 ("Cox's website indicates that it offers telephony services throughout the state.").

[19] *See id.* (citing Timothy C. Barmann, *Verizon Waiting for the Call on Long-Distance Service*, PROVIDENCE JOURNAL-BULLETIN, Nov. 4, 2001, at E1).

[20] *See also* Verizon July 1, 2008 *Ex Parte* Letter at 1 (referring to "Cox's public statements"). Verizon's evidence of Cox's market share in Rhode Island is similarly deficient. According to Verizon (at 19), "Cox indicates that it provides voice and data services that meet the needs of enterprise customers." But Verizon's only support for this statement is references to Cox press releases and Cox's website. *See* Petition, Attachment E, Declaration of Quintin Lew, John Wimsatt, and Patrick Garzillo, ¶¶ 42-43 & nn.66-77. Tellingly, Cox has stated that "it serves **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** the approximately 44,000 businesses in Rhode Island." Cox Comments at 8.

[21] *See, e.g.*, Petition at 24 ("Cox's website has a page devoted to providing business services in Rhode Island") & Exhibit 13 (printouts from Cox Business Services' website).

[22] *See also Cable Coverage Threshold Disclosure Public Notice* at 2.

[23] Cox Comments at 3.

the 6-MSA proceeding and Cox has stated in the record here (at 6) that it "has not . . . engaged in any large-scale facilities build-out since the Commission considered the Providence Petition."

Finally, Verizon asserts that satisfaction of the FCC's network coverage test is dispositive. For example, Verizon claims (at 21) that "based solely on the demonstrated competition from cable, forbearance is appropriate." On the contrary, in the *6-MSA Order* (n.113), the FCC expressly "reject[ed] Verizon's suggestion that, in prior orders, the Commission granted forbearance simply on cable coverage." In response to Joint Commenters' and other opponents' arguments that facilities-based competition from non-cable competitors in the Rhode Island business market is insufficient to justify forbearance,[24] Verizon essentially argues (at 20) that evidence of such competition is unnecessary. Verizon relies on the Commission's statement in the *6-MSA Order* (n.131) that "the Commission's reference to competitive deployment in the *Qwest Omaha Forbearance Order* was incidental and supplemental to" its findings that Cox was a substantial threat to Qwest. *See also* Verizon July 1, 2008 *Ex Parte* Letter at 3. When read in context, however, it is abundantly clear that the FCC found evidence of "*competitive fiber*"—namely, "*fiber route maps*"—to be "incidental and supplemental" to its findings regarding cable. *See 6-MSA Order* ¶ 40 & n.131 (emphasis added). Thus, contrary to Verizon's claims, even if it met the FCC's network coverage test (which it does not), the Commission's inquiry would not end there.

3. The Commission Should Exclude "Cut-the-Cord" Mobile Wireless Customers Of All ILEC-Affiliated Wireless Carriers From Its Calculation of Competitors' Market Share.

Notwithstanding the fact that Verizon's market share data is the same as that already found to be insufficient by the FCC in the *6-MSA Order*,[25] Verizon asserts (at 6) that it meets the Commission's minimum threshold for competitors' share of residential lines when all cut-the-cord mobile wireless customers are included.[26] As Joint Commenters have argued in this and similar forbearance proceedings, however, mobile wireless service should not be included in the same product market as wireline voice service. It follows that mobile wireless subscribers

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[24] *See* Opposition at 40-43.

[25] *See, e.g.,* Joint Movants' Motion to Dismiss Or, In the Alternative, Deny Petition for Forbearance, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24, at 5-9 (filed Mar. 17, 2008); *see also* Cox Comments at 3-5.

[26] While Verizon argues (at 11-14) that the Commission should use the CDC's national estimate of cut-the-cord households in its analysis, this argument is moot in light of the FCC's rejection of the CDC survey data in the *4-MSA Order*. *See 4-MSA Order* ¶ 21 ("although various commenters suggest that we rely on the national wireless-only household data published by the Center for Disease Control (CDC) . . . we decline to do so."); *see also id.* Appendix B, n.8 ("In light of our questions about the reliability of certain data in this proceeding, we do not address the merits of Qwest's estimates of its share of mobile wireless households. . . . We reiterate our insistence on reliable and geographically specific data in future forbearance proceedings . . . .").

should be excluded from the calculation of competitors' market share.[27] Verizon's only response to this argument is that "in order for two competing technologies to constrain each other's prices, it 'only requires that there be evidence of sufficient substitution for significant segments of the mass market,' not that every customer views the two services as substitutes.'" *See* Verizon Reply Comments at 10 (internal citation omitted). But the Joint Commenters do not argue that every customer must view wireline and wireless voice service as substitutes in order for them to be included in the same product market. Rather, the relevant question is what constitutes "sufficient substitution" and as explained by Dr. Kent Mikkelsen in the 4-MSA proceeding, the presence of *some* amount of substitution does not demonstrate that wireline and wireless service are part of the same product market.[28] In a November 2008 report summarizing the views of economists and other analysts on the state of competition in the telecommunications industry, the Department of Justice observed as follows:

> The existence of some consumers who choose to substitute wireless service for access to the landline network does not demonstrate that wireless service is an effective constraint on prices for access to landline services. . . .
>
> . . . [T]here is little evidence that landline telephone companies consider the threat of wireless substitution sufficient to change their access prices. . . . In fact, stand-alone landline prices have remained relatively stable and do not appear to have declined substantially below the levels at which they are capped by regulation.
>
> Most significantly, Dr. [Simon] Wilkie observed that econometric analyses of the issue have not shown that wireless and landline telephone services are in the same product market, though they may be getting close. . . .
>
> Dr. Wilkie concluded that deregulation of the monthly prices consumers pay for landline telephone service based on the number of wireless providers or number of traditional access lines lost may result in higher prices because it has not been shown that these alternative services are sufficiently competitive to effectively constrain pricing by the incumbents.

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[27] *See, e.g.,* Opposition at 15-19; *see also* Letter from T. Jones, Counsel for Cbeyond, Inc., et al., to Marlene H. Dortch, Secretary, FCC, *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Dkt. No. 07-97, at 2-10 (filed May 7, 2008) ("*Joint Commenters' May 7, 2008 Ex Parte*") (attached hereto as Exhibit A); *see generally* K. Mikkelsen, "Mobile Wireless 'Cut the Cord' Households in FCC Analysis of Wireline Competition," Apr. 21, 2008, WC Dkt. No. 07-97 (filed Apr. 22, 2008) ("Mikkelsen White Paper") (attached hereto as Exhibit B).

[28] *See* Mikkelsen White Paper at 5 (concluding that "one cannot rely on the presence of mobile wireless alternatives to constrain the price of wireline service").

U.S. Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers*, at 65-67 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf (footnotes omitted).

Verizon also attempts to backtrack from the survey results it published in May 2008 in which 83 percent of respondents reported that they "intend[ed] to continue using their landline home phone indefinitely."[29] Verizon claims that the "'survey involved only existing landline subscribers, and not the approximately 14 percent of subscribers nationwide who have *already* decided to cut the cord.'" Verizon Reply Comments n.12 (emphasis in original). This argument fails, however, because as Dr. Mikkelsen has explained, the relevant inquiry is whether a hypothetical monopolist could increase prices paid by *existing* wireline customers."[30] End users who have cut the cord are irrelevant to the inquiry.

Even if the FCC defines the wireless voice product market to include mobile wireless service (which it should not), the Commission must account for mobile wireless subscribers in a consistent and coherent fashion. Verizon argues (at 6) that "all cut-the-cord wireless subscribers (including those of Verizon Wireless)" should be *included* in the FCC's calculation of competitors' market share. Verizon further contends (at 11) that its interest in retaining its landline customers and its ability to bundle wireless and wireline products are both "irrelevant" to the issue of whether Verizon Wireless' cut-the-cord customers should be considered in the Commission's market share analysis. Verizon completely disregards, however, the FCC's *rationale* for excluding Verizon Wireless' subscribers from competitors' market share in the *6-MSA Order*. There, the FCC *expressly stated* that the rationale for its decision to include Verizon Wireless cut-the-cord customers in its calculation of Verizon's market share (and thus, exclude them from its calculation of competitors' market share) was that ILEC-affiliated wireless carriers such as Verizon Wireless have an incentive to prevent cannibalization of their ILEC affiliate's wireline assets:

> [A]ttributing Verizon Wireless' share to Verizon is consistent with our methodology in prior orders. . . . This approach is warranted because, as the Commission repeatedly has found, "a wireline-affiliated [wireless] carrier would have an incentive to protect its wireline customer base from intermodal competition."

6-MSA Order, App. B, n.6 (alteration in original) (internal citations omitted).

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[29] *See* Verizon Reply Comments n.12 (quoting Verizon Press Release, "New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for Its Quality, Safety Features" (May 27, 2008), http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html (last visited Dec. 3, 2008)).

[30] *See* Mikkelsen White Paper at 3 (whether a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price "depends on how current purchasers of wireline voice services would respond to such a price increase").

Thus, the FCC excluded in-region cut-the-cord mobile wireless customers of the ILEC-affiliated wireless carrier in the markets for which the petitioner sought forbearance because that ILEC-affiliated wireless carrier had an incentive to prevent its affiliate's landline customers from cutting the cord. The logical extension of this reasoning is that, where ILEC-affiliated wireless carriers generally price and market their services in the same way out-of-region as in-region, the FCC must also exclude the cut-the-cord mobile wireless customers of the other ILEC-affiliated wireless carriers operating in Verizon's region from its calculation of competitors' market share. And, Verizon Wireless and AT&T Mobility do in fact price the vast majority of their services the same way in-region and out-of-region.[31] As AT&T has stated, "Like those of other national carriers [including Verizon Wireless], all of the rate plans AT&T Mobility currently offers in the continental United States are 'national' plans"[32] and "their pricing is determined almost entirely on a national basis."[33] In light of ILEC-affiliated wireless carriers' national pricing and marketing, the logical conclusion to be drawn from the Commission's finding in the *6-MSA Order* is that ILEC-affiliated wireless carriers seek to prevent their affiliates' wireline customers from cutting the cord out-of-region just as much as they do in-region. Thus, if all ILEC-affiliated customers are excluded from competitors' market share in-region, they must be excluded from competitors' market share out-of-region as well.

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[31] *See, e.g.*, Description of Transaction, Public Interest Showing and Related Demonstrations, Declaration of Robert D. Willig and Jonathan M. Orszag, *In re Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Dkt. No. 07-153, at 12 (filed July 13, 2007) ("AT&T Willig-Orszag Declaration") ("[I]t is important to note that AT&T generally sets its prices for wireless service on a nationwide basis."); *see also* Letter from Rashann R. Duvall, Regulatory Counsel, Verizon Telephone Companies, to Marlene H. Dortch, Secretary, FCC, *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Dkt. No. 07-97, at 4 (filed June 30, 2008) (acknowledging that "wireless providers increasingly set their prices on a national basis").

[32] Description of Transaction, Public Interest Showing and Related Demonstrations, Declaration of Paul Roth, President - Sales and Marketing, AT&T Mobility LLC, *In re Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Dkt. No. 07-153, at 1 (filed July 13, 2007); *see also id.* at 2 ("AT&T Mobility's service offerings and rate plans are uniform in all areas of the country" and it "develops its rate plans, features, and prices in response to competitive conditions and offerings at the national level – primarily the plans offered by other national carriers.").

[33] AT&T Willig-Orszag Declaration at 12. The FCC ultimately rejected AT&T's argument that the most appropriate geographic level for market analysis of its proposed merger with Dobson Communications was the national level. *See In re Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd. 20295, ¶ 25 (2007). However, that holding has no relevance here. ILEC affiliates' use of national service plans supports the conclusion that ILEC affiliates offer mobile wireless services on the same terms and conditions within and outside of their ILEC-affiliate regions regardless of what geographic market the Commission might use in its merger review.

Verizon dismisses (at 11) this logic on the ground that "Verizon has been losing substantial numbers of wireline customers and that wireless is highly competitive." But this was equally true in the six MSAs for which the FCC excluded Verizon Wireless' cut-the-cord customers from competitors' market share. The competitiveness of the wireless market is therefore irrelevant.

Finally, Verizon argues (at 6) that even when Verizon Wireless cut-the-cord customers are attributed to Verizon, the competitors' share of *residential voice* lines would still meet the Commission's market share test. Notwithstanding that AT&T Mobility's cut-the-cord customers in Rhode Island should also be excluded from the calculation, Verizon's purported satisfaction of the market share test in this manner has no bearing on whether forbearance should be granted in the *business* market, or whether forbearance should be granted for *data* services (regardless of whether such services are being provided in the residential or business market).

4. Competition That Relies On Verizon's Own Facilities Should Be Excluded From The Commission's Calculation Of Competitors' Market Share.

In its Reply Comments (at 16), Verizon argues that the FCC must account for competition that relies on its special access services in its market share analysis because competitors use special access "extensively in Rhode Island, much more extensively in fact than they are using UNEs." Verizon further claims (at 16) that "[t]he fact that a few competitors have chosen business models that depend on UNEs [as opposed to special access] is not, as some competitors suggest, a legitimate consideration in the forbearance inquiry." The Commission, however, has already explicitly rejected Verizon's argument:

> In support of its request for UNE relief, Verizon also argues that competitors are overall primarily using special access rather than UNEs when providing service over Verizon's facilities. For the reasons set forth in the *Triennial Review Remand Order*, the Commission already recognized that the availability of UNEs is a competitive constraint on special access pricing. While Verizon can demonstrate a fair amount of retail enterprise competition using Verizon's special access services and UNEs, competition that relies on Verizon's own facilities is not a sufficient basis to grant forbearance from UNE requirements.

6-MSA Order ¶ 42 (internal footnotes omitted). There is no basis for departing from this reasoning here.

Verizon also argues that "service through non-UNE wholesale alternatives such as Wholesale Advantage and resale" should not be excluded from the Commission's market share calculation because, consistent with the FCC's finding in the *Omaha Order*, an ILEC has "'the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than [the ILEC].'" *See* Verizon Reply Comments at 15 (quoting *Omaha Order* ¶ 67). This argument fails for three reasons.

First, Verizon's Wholesale Advantage product consists of a UNE loop (priced at a TELRIC-based rate) combined with non-UNE switching and transport (priced at "commercial" rates). In other words, competitors that serve customers via Verizon's Wholesale Advantage do so *via* Verizon's UNE loops. As a result, Wholesale Advantage is not, as Verizon claims, a "non-UNE wholesale alternative" to UNEs. Moreover, because Wholesale Advantage customers are served *via* UNE loops, the FCC cannot logically rely on competition from Wholesale Advantage providers as a basis for eliminating UNE loops.[34] It would be ludicrous to rely on UNE-based competition as the basis for eliminating the very same UNEs.

Second, resale-based competition cannot be included in the Commission's calculation of competitors' market share because it is also competition that relies on Verizon's own facilities. In addition, as Joint Commenters explained in the 4-MSA proceeding, resale offers competitors no flexibility in the services they can offer.[35] Furthermore, the "'retail-less-discount'" pricing of resale provides no constraint on ILEC prices because higher ILEC prices yield higher wholesale prices.[36]

Third, as discussed at length in related forbearance proceedings,[37] it is now clear that the FCC's "predictive judgment" in the *Omaha Order* that the presence of a single facilities-based

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[34] It is also worth noting that, just as the availability of UNEs constrains special access pricing, the availability of DS0 unbundled loops constrains the price of Wholesale Advantage. As explained, Wholesale Advantage consists of a UNE loop and non-UNE switching and transport. Accordingly, if Verizon were to significantly increase the price of Wholesale Advantage, such an increase may provide other carriers with an incentive to purchase DS0 unbundled loops and supply their own switching capability instead.

[35] *See* Letter from T. Jones, Counsel for Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Dkt. No. 07-97, Attachment, at 4-5 (filed May 15, 2008); *see also* Gillan Associates, "The Irrelevance of Resale and RBOC Commercial Offers to Competitive Activity in Local Markets," May 2008, WC Dkt. No. 07-97, at 2 (filed May 15, 2008) ("Gillan Resale White Paper") (attached hereto as Exhibit C) (stating that "resale is nothing more than the re-offering of the retail service as designed by the incumbent" and that "[t]here is no meaningful ability for the purchasing carrier (that is, the reseller) to differentiate its product from that offered by the incumbent through innovation").

[36] *See* Gillan Resale White Paper at 2 ("[R]esellers can never impose a competitive constraint on the incumbent's prices . . . because the wholesale price moves up with any increase in the retail price. Consequently, the ILEC is able to simultaneously raise its rivals' costs in lock-step with any desired retail rate increase, effectively ensuring that rivals match – and, therefore, reinforce – the incumbent's rate increases."). *Id.*

[37] *See, e.g.*, Opposition of Time Warner Telecom Inc. et al., *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Dkt. No. 07-97, at 41-43 (filed Aug. 31, 2007); *see generally* Petition for Modification of McLeodUSA Telecommunications Services, Inc., *In re*

competitor in the mass market (i.e., Cox) has *not* provided Qwest with the incentive to offer reasonable wholesale pricing for DS-0, DS-1, and DS-3 loops. There is no reason to believe that Verizon would act any differently here if forbearance was granted.

5. Verizon's Pricing Behavior Demonstrates The Lack Of Competition In The Rhode Island Business Market.

In its Reply Comments (n.24), Verizon asserts that "there is no plausible claim that competition is inadequate to constrain price in Rhode Island." While Verizon acknowledges that "[it] has increased its business rates numerous times since September 2006," Verizon argues that such increases "were accompanied by rate decreases for customers who sign up for [t]erm (*e.g.*, 24 month) and [p]ackage (*e.g.*, Freedom for Business) plans" and that "there is no volume commitment" for these plans. Verizon Reply Comments n.24 (emphasis omitted). However, if Verizon faced as much rampant competition as it claims, it would not be able to increase *any* of its rates for business services, regardless of whether they are month-to-month rates, term plan rates, or package plan rates. Moreover, term plans merely serve to harm purchasers by effectively locking up demand and giving Verizon an incentive to raise its undiscounted month-to-month rates, as it has admittedly done in Rhode Island. As explained by Dr. Joseph Farrell in the Commission's special access reform rulemaking proceeding:

> [W]hen a monopoly offers proportional or relative discounts off its undiscounted prices in order to induce customers to agree to exclusionary provisions, it has an incentive to set the undiscounted price above even the monopoly level (because, rather than simply deterring demand, an increase above the monopoly level steers customers into the discount plans and also brings the discount prices closer to the monopoly level).[38]

Thus, Verizon's anticompetitive pricing behavior in Rhode Island is consistent with that of a monopolist, not of an incumbent that faces any significant competition in the market for high-capacity loops and transport needed to serve business customers.

6. The Commission Must Apply The Forbearance Standard, Not The Impairment Standard, In The Instant Forbearance Proceeding.

In response to Verizon's argument that the FCC must forbear from unbundling obligations "in the face of evidence of non-impairment,"[39] Joint Commenters explained that, under the Commission's own precedent, it cannot make impairment findings in a forbearance proceeding. *See* Opposition at 44. Verizon mischaracterizes (at 27) Joint Commenters'

Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Dkt. No. 04-223 (filed July 23, 2007).

[38] *See* Reply Declaration of Joseph Farrell On Behalf of CompTel, *In re Special Access Rates for Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25, ¶ 4 (filed July 29, 2005).

[39] Petition at 36.

statements as a call for the FCC "to close its eyes to evidence that competitors are not impaired" and as a request that Verizon file a petition to bring evidence of impairment to the Commission's attention. *See* Verizon Reply Comments at 26. To begin with, as Joint Commenters have explained, there is no such evidence. More importantly, while Verizon reiterates that it is merely asking "the Commission to *apply* the impairment standard,"[40] the FCC explicitly held in the *Omaha Order* that "*we reject commenters' proposal that we interpret and apply the [S]ection 251(c)(3) impairment standard or the [S]ection 251(h) standard to our forbearance analysis.*" *Omaha Order* n.48 (emphasis added).

Verizon also rehashes its argument that the *Triennial Review Remand Order* was "the Commission's express invitation to incumbents"[41] "to make 'no impairment' showings through forbearance petitions." Petition at 36. The FCC, however, has a different interpretation of its own "invitation." As the Commission held in the *Anchorage Order*:

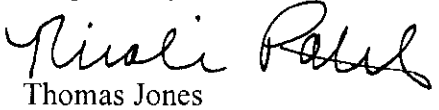
> Rather than initiating a number of separate proceedings to address, case-by-case, situations where the Commission's impairment findings did not perfectly match local market realities, *the Commission instead invited incumbent LECs to seek forbearance* from the application of the Commission's unbundling rules in specific geographic markets *where the requirements for forbearance have been met*.

Anchorage Order ¶ 5 (emphasis added). The FCC further held,

> The Commission's [S]ection 251(d)(2) impairment analysis, *while instructive* in a [S]ection 10(a) forbearance proceeding, *does not bind the Commission's forbearance review*. In a forbearance proceeding, Congress has charged the Commission with determining whether the standards of [S]ection 10(a) are satisfied; those standards are not identical to the standards of [S]ection 251(d)(2).

Id. n.13 (emphasis added). Thus, the Commission emphasized that it was *not* inviting ILECS to make *non-impairment* showings through *forbearance* petitions, but that it was inviting ILECs to make showings that justify *forbearance* through *forbearance* petitions. As explained at length, Verizon has failed to do so here.

Respectfully submitted,



Thomas Jones
Nirali Patel

Attorneys for One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc.

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[40] Verizon Reply Comments at 25 (emphasis in original).

[41] *Id.* at 28.

EXHIBIT A

VIA ECFS

EX PARTE

May 7, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97

Dear Ms. Dortch:

Cbeyond Inc., Integra Telecom, Inc., One Communications Corp. and Time Warner Telecom Inc.,[1] through their undersigned counsel, explain in this *ex parte* letter why the Commission should not consider mobile wireless service as a substitute for wireline voice or data services in the above-captioned proceeding.

In its recent *ex parte* submissions, Qwest, citing to the *6-MSA Order*,[2] suggests that the Commission should include "cut-the-cord" or "wireless -only" households (*i.e.*, those that have replaced their wireline service with mobile wireless service) in its calculation of competitors' market share in the 4 MSAs at issue.[3] Qwest relies on the Commission decision in the *6-MSA*

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[1] Time Warner Telecom Inc. amended its Certificate of Incorporation effective March 12, 2008 to change its name to tw telecom inc. in preparation for a broader name change that will be effective July 1, 2008. The company will continue to use and be known as Time Warner Telecom Inc., its trade name, until July 1, 2008.

[2] *In re Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (rel. Dec. 5, 2007) ("*6-MSA Order*").

[3] *See, e.g.*, Letter from Daphne E. Butler, Corporate Counsel, Qwest to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 7 & nn.17-18 (filed Mar. 10, 2008) ("Consistent with its

Order to include "cut-the-cord wireless substitution" in its forbearance analysis.[4] But that decision was and is in error and must now be reversed.

The Commission itself realizes this. Most obviously, just last week, the Commission reached the diametrically opposed conclusion that "the majority of households do not view wireline and wireless services to be direct substitutes."[5] As Dr. Kent Mikkelsen explained in his white paper, "Mobile Wireless Service to 'Cut the Cord' Households in FCC Analysis of Wireline Competition," which was recently filed in the above-referenced docket,[6] even if a small minority of households do view mobile wireless as a substitute for wireline voice service, this does not mean that mobile wireless service belongs in the same product market as wireline voice service. Accordingly, the customers who have cut the cord and rely on wireless voice service exclusively should not be included in the mass market share counts for the Denver, Minneapolis, Phoenix and Seattle MSAs. But even if the FCC includes mobile wireless in the wireline voice market, which it should not, it must exclude cut-the-cord wireless customers of ILEC-affiliated wireless carriers from its market share calculation.

I. Application Of The DOJ-FTC Merger Guidelines Demonstrates That Mobile Wireless Service Does Not Belong In The Wireline Voice Service Product Market.

As Dr. Kent Mikkelsen explained in his white paper, the Commission generally uses the DOJ-FTC Merger Guidelines to determine the scope of the relevant product market for its competition analysis (and thus, whether one product belongs in the same market as another).[7] Under the Merger Guidelines, a relevant product market is "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those

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past reliance upon the [National Center for Health Statistics] wireless substitution data, the Commission once again relied upon the most recent NCHS data available in the *Verizon 6 MSA Order*. . . . [I]t used that statistic in the calculation of market share detailed in Appendix B of the *Verizon 6 MSA Order*. On December 10, 2007, the NCHS released its preliminary estimates of wireless substitution for the first half of 2007. According to the NCHS report, this 'cord cutter' group had grown to an estimated *13.6 percent* by June 2007. . . .") (emphasis in original).

[4] *See 6-MSA Order* n.89. *See also id.*, Appendix B.

[5] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Order, WC Docket No. 05-337, ¶ 21 (rel. May 1, 2008) ("*CETC Interim Cap Order*").

[6] *See* K. Mikkelsen, "Mobile Wireless 'Cut the Cord' Households in FCC Analysis of Wireline Competition," Apr. 21, 2008, WC Dkt. No. 07-97 (filed Apr. 22, 2008) ("Mikkelsen White Paper") (attached hereto).

[7] *See, e.g., Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, n.83 (2005) ("*Verizon/MCI Merger Order*"); *Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 20 FCC Rcd. 13967, ¶ 39 (2005) ("*Sprint/Nextel Merger Order*").

products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price."[8] It is often profitable for a monopolist to impose a nontransitory price increase on customers, even if this causes some customers to switch to other services. In other words, the monopolist will increase prices so long as the resulting loss of customers is outweighed by profits gained from increasing prices paid by those customers that continue to purchase the service in question.[9] It is clear, therefore, that the existence of some cross-demand elasticity between products (i.e., a small increase in demand for one product in response to an increase in the price of another) does not, by itself, mean that they belong in the same product market.

This is particularly true in the case of wireline service. As Dr. Mikkelsen explains, the available evidence indicates that demand for secondary fixed lines is "relatively inelastic" and the demand for primary fixed lines is "even more inelastic." Mikkelsen White Paper at 5. A hypothetical price increase would therefore be profitable because few customers would reduce their consumption of wireline service as a result of such an increase. *Id.* Thus, according to Dr. Mikkelsen, "wireline service is a separate relevant market without including mobile wireless service." *Id.* This does not mean, however, that there is no substitution between wireline service and mobile wireless service. Rather, Dr. Mikkelsen states,

> It simply means that, in response to a small wireline price increase, purchasers of wireline service would not turn from wireline service to mobile wireless service in such great numbers that the wireline price increase would be unprofitable. In other words, one cannot rely on the presence of mobile wireless alternatives to constrain the price of wireline service.

Id. Thus, the presence of some amount of substitution does not demonstrate that wireline and wireless service are part of the same product market.

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[8] DOJ & FTC, Horizontal Merger Guidelines, 57 F.R. 41552, §1.11 (1992) (rev. Apr. 8, 1997) ("Merger Guidelines"). The Merger Guidelines also define the relevant market as the narrowest set of products or services that meet the criteria. *See id.* § 1.0.

[9] *See* Mikkelsen White Paper at 4 (explaining that "[w]hether the hypothetical increase is profitable overall—which in turn determines whether the set of products or services under consideration is a relevant product market—normally depends on the balance between" increasing profits by "[c]harging a higher price to customers that retain their service" and "giving up variable profits on customers that drop their service").

It follows that, contrary to Qwest's claims,[10] the availability of mobile wireless alternatives does *not* constrain Qwest's retail wireline prices. This is demonstrated by Qwest's own pricing behavior. If, as Qwest alleges, significant numbers of its customers viewed the four national facilities-based providers of mobile wireless service as offering substitutes for wireline voice and DSL service, then Qwest would be forced to lower its rates for such wireline services. According to a recent analyst report, however, Qwest *increased* its total price for bundled broadband and unlimited voice (local and long distance) service by three percent from the first quarter of 2007 to the first quarter of 2008.[11]

II. The Commission Must Cease Including Mobile Wireless Service In The Wireline Voice Product Market For Purposes Of Analyzing Petitions For Forbearance From Unbundling Requirements.

In the *6-MSA Order*, the Commission treated mobile wireless service as belonging to the same product market as wireline voice service.[12] In doing so, the FCC relied solely on its analysis in the *Verizon/MCI Merger Order* and *AT&T/BellSouth Merger Order*; the relevant discussion in both of those orders is virtually identical:

> [G]rowing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service in lieu of wireline local services. . . . We also find that Verizon considers this growing substitution in developing its marketing, research and development, and corporate strategies for its local service offerings. Finally, we base our finding [to include mobile wireless service in the wireline product market] on the Commission's determination in the *Sprint/Nextel Order* that Sprint/Nextel, after the merger, would likely take actions that would increase intermodal competition between wireline and mobile wireless services, as well as Sprint's plans to focus its efforts on encouraging consumers to "cut the cord." . . . Based on [these factors], we conclude that mobile wireless services should be included within the product market for local services to the extent that customers

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[10] *See, e.g.*, Petition of Qwest Corp. for Forbearance Pursuant to Section 47 U.S.C. § 160(c) in the Denver MSA, WC Dkt. No. 07-97, at 14 (filed Apr. 27, 2007) ("Data indicate that customers would have a viable alternative should Qwest attempt to raise its wireline prices. . . . Wireless competition accordingly protects against wireline price increases in the first instance."); *see also* Reply Comments of Qwest, WC Dkt. No. 07-97, at 26 (filed Oct. 1, 2007).

[11] *See* Bank of America Equity Research, "Battle for the Bundle: Consumer Wireline Services Pricing: Bells Hike Prices Across the Board, Cox Bails on Pivot," at 5 (Apr. 14, 2008).

[12] *See 6-MSA Order* n.89 ("In addition, based on the record here, and consistent with recent precedent, we include cut-the-cord wireless substitution.") (citing *Verizon/MCI Merger Order* ¶¶ 90-91 and *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, 5714, ¶ 95 (2007) ("*AT&T/BellSouth Merger Order*")).

> rely on mobile wireless service as a complete substitute for, rather than complement to, wireline service.

Verizon/MCI Merger Order ¶ 91; *see also AT&T/BellSouth Merger Order* ¶ 96.

This explanation cannot support treating mobile wireless service as a substitute for wireline voice service in the instant proceeding. Most importantly, the Commission has itself now rejected the reasoning in the *6-MSA Order*. In its recent order establishing an interim cap on the amount of high-cost support for competitive eligible telecommunications carriers ("CETCs"), the Commission explained that limiting the subsidies for CETCs made sense because "wireless competitive ETCs do not capture lines from the incumbent LEC to become a customer's sole service provider, except in a small portion of households." *CETC Interim Cap Order* ¶ 20. The Commission then concluded that "the majority of households do not view wireline and wireless services to be direct substitutes." *See id.* ¶ 21. Moreover, the Commission rejected CTIA's reliance on a recent Centers for Disease Control and Prevention ("CDC") survey as evidence that mobile wireless is a substitute for wireline voice service. The Commission did so, even though the CDC survey upon which CTIA relied was the same survey the FCC relied upon in the *6-MSA Order* and even though that CDC survey found a slightly higher rate of customers cutting the cord than the data relied upon in the *Verizon/MCI Merger Order* and the *AT&T/BellSouth Merger Order*. As the Commission explained in rejecting CTIA's argument, the CDC study's finding that nearly 13 percent of the population has cut the cord[13] "fails to demonstrate that wireless ETCs are a complete substitute for wireline ETCs." *See id.* n.63. There is no basis for concluding that the mobile wireless services that wireless ETCs offer are any different from those offered by mobile wireless providers in the Denver, Minneapolis, Phoenix or Seattle MSAs or that the substitutability analysis would be any different in those MSAs than in high-cost areas. The Commission must therefore apply the conclusions it reached in the *CETC Interim Cap Order* to the forbearance petitions at issue in this proceeding.

Furthermore, the Federal-State Joint Board on Universal Service has now recommended that the Commission create separate high cost funds for wireline voice service (i.e., the "Provider of Last Resort" fund) and mobile wireless voice service (i.e., the "Mobility Fund").[14] This proposal obviously reflects the Joint Board's recognition that wireline and mobile voice services offer consumers *different* services and that a customer in a high-cost area that is able to receive affordable mobile voice service will still demand and need wireline voice service. That recognition accords with the Commission's finding last year in the *Qwest 272 Sunset Order*[15]

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[13] The CDC survey data could be misconstrued to support the conclusion that the rate at which households are cutting the cord is increasing, but as economist Joseph Gillan has explained, the data does not support this conclusion. *See* Gillan Associates, "Properly Estimating the Size of the Wireless-Only Market," March 2008, WC Dkt. No. 07-97, at 5-6 (filed Apr. 22, 2008) ("Gillan Study").

[14] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd. 8998, ¶¶ 16-23 (2007).

that a majority of presubscribed interexchange customers also subscribe to mobile wireless services.

Even apart from these clear and dispositive conclusions, the Commission's explanation in the *Verizon/MCI Merger Order* and the *AT&T/BellSouth Merger Order* for treating mobile wireless services as belonging to wireline voice product market is flawed and cannot support that approach in the instant forbearance proceeding. *First* and foremost, the presence of *some* past increase in the number of customers that cut the cord does not mean that *enough* of the *existing* wireline voice customers view wireless and wireline services as substitutes to include mobile wireless in the same product market as wireline service (i.e., to prevent a monopolist serving all wireline customers from profitably imposing a significant and non-transitory rate increase on wireline customers). To begin with, the percentage of the population that has "cut the cord" in the past is not indicative of the demand elasticity for wireline service. Mikkelsen White Paper at 8. The only relevant inquiry is whether mobile wireless service constrains the prices that Qwest charges its huge number of "remaining wireline customers." *Id.* at 9. Nor is the marginal increase in the percentage of total customers that subscribe solely to mobile wireless customers relevant, because, again, the real question is whether a hypothetical monopolist in the provision of wireline service to *existing wireline customers* could profitably increase price. Such an increase in price might well increase the total number customers that cut the cord, but the increase in wireline prices would still be profitable if enough of the existing wireline customers retain that service.

Moreover, the available evidence indicates that those that purchase wireline service today are unlikely to cease purchasing wireline service in favor of mobile wireless if wireline service prices increase. Wireline voice service offers several distinct features that mobile wireless service does not offer. For example, wireline service provides, among other things, "high and consistent transmission quality," "a common connection point for all members of a household," and "more accurate and reliable enhanced 911 emergency capability than mobile wireless service." *Id.* at 6-7. Existing purchasers of wireline service typically view these features as important enough that they would not cut the cord if forced to pay higher prices for wireline service. According to a recent survey of landline phone owners commissioned by Verizon, 83 percent of respondents "intend to continue using their landline home phone *indefinitely*."[16] Fully 94 percent of the survey respondents cited reliability and 91 percent cited safety as the primary reasons they retain wireline service. *See Verizon cut-the-cord survey.* Importantly, 74 percent of

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[15] *See Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶ 17 (rel. Mar. 9, 2007) ("*Qwest 272 Sunset Order*").

[16] Press Release, "Verizon, New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for Its Quality, Safety Features" (Mar. 27, 2008), http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html ("*Verizon cut-the-cord survey*") (reporting results of survey of more than 800 landline phone customers, 74 percent of whom also have a mobile phone) (emphasis added).

those surveyed reported that their landline home phone service "trumped their mobile phone in terms of voice quality, reliability, and consistency of service." *Id.* There is no reason to believe that existing wireline customers in the Denver, Minneapolis, Phoenix and Seattle MSAs are any different from those in the Verizon region.

The differences in service characteristics and pricing reflect a fundamental distinction in consumers' minds between wireline voice and mobile wireless service. Not surprisingly, while the price structures for wireline and mobile wireless services have become somewhat more similar recently, they still "differ greatly." *See* Mikkelsen White Paper at 7-8 (describing substantial differences in prices between wireline and mobile wireless service).

Second, the Commission's assertion that Verizon "considers this growing substitution" in developing its marketing and corporate strategies offers little support for the inclusion of mobile wireless in the wireline voice product market. As Dr. Mikkelsen explains, "the Commission has not disclosed how or to what extent this factor enters the carriers' strategy decisions." *Id.* at 9. Corporate strategists "consider" many factors, and "[s]uch consideration may not provide any evidence regarding the degree of price sensitivity between wireline and mobile wireless service." *Id.* In this proceeding, Qwest has not provided any evidence as to whether, and if so, how, it accounts for mobile wireless service in developing its marketing strategy for wireline voice service. In any event, some consideration of wireless substitution in a strategic plan does not, by itself, support the conclusion that a wireline carrier believes that wireless service constrains its ability to unilaterally increase the price of wireline service. *Id.* For example, it is possible, indeed likely, that a wireline carrier would focus its consideration of wireless on a narrow subset of customers, such as college students, that are most likely to "cut the cord."[17] There is every reason to believe that a hypothetical wireline monopolist could unilaterally increase wireline prices profitably, notwithstanding the possibility that such an increase might cause a narrow subset of customers to discontinue their wireline service.

Third, the Commission's prediction in the *Sprint/Nextel Merger Order* that the combined company would position its mobile wireless service in the marketplace so as to increase the extent to which consumers view mobile wireless to be a substitute for wireline voice service has proven to be incorrect. *Sprint/Nextel Merger Order* ¶ 142. Since the merger, the combined company has experienced a multitude of well-publicized problems with its network reliability and service quality.[18] A recent J.D. Power and Associates survey ranked Sprint dead last among

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[17] *See* Gillan Study at 6 (discussing the prevalence of cut-the-cord behavior among college-age adults).

[18] *See, e.g.*, Marguerite Reardon, "Broken connection for Sprint Nextel," CNET News.com, Jan. 29, 2007, http://www.news.com/2100-1039_3-6154071.html (last visited May 5, 2008) (discussing the network integration problems that caused Sprint to lose approximately 300,000 subscribers in the fourth quarter of 2006).

mobile wireless carriers in customer satisfaction in every region in the U.S.[19] The most heavily weighted factor in that survey was customers' perception of call quality,[20] which is based on dropped calls and other metrics.[21] Given the importance of reliability among those choosing between wireline and mobile wireless voice service,[22] it is hard to see how Sprint-Nextel offers anything close to a viable substitute for wireline service. In fact, far from gaining customers, Sprint-Nextel has been losing customers in droves—it suffered a net loss of about 1.2 million customers in the fourth quarter of 2007 alone and is expected to continue to lose market share for the foreseeable future.[23]

There is no evidence that any of the factors that the Commission relied upon in concluding that Sprint-Nextel would increase competition with wireline service offerings post-merger has had a significant effect in that regard. The Commission concluded that, while ILEC-affiliated wireless carriers would have an incentive to avoid encouraging customers to cut the cord, it concluded that Sprint-Nextel would have no similar incentive. *See Sprint/Nextel Merger*

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[19] *See* Jason Gertzen, "Consumers Give Sprint Nextel Failing Grade in Latest Survey," Kansas City Star, Apr. 25, 2008, *available at* http://www.crmbuyer.com/story/62756.html (last visited May 6, 2008).

[20] *See* "J.D. Power and Associates Reports: Despite Higher Costs for Additional Services, Wireless Customers Report Particularly High Levels of Satisfaction with Wireless Plan Upgrades," PRNewswire, Apr. 24, 2008, http://news.moneycentral.msn.com/ticker/article.aspx?Feed=PR&Date=20080424&ID=8534540&Symbol=MHP (last visited May 5, 2008) (listing six key factors on which customer satisfaction is measured in the semiannual J.D. Power and Associates survey: call quality (32%); brand image (17%); cost of service (14%); service plan options (14%); and billing (12%)).

[21] *See* "J.D. Power and Associates Reports: Alltel, T-Mobile, U.S. Cellular and Verizon Wireless Each Make a Sound Connection with Wireless Users and Rank Highest in Customer Satisfaction with Call Quality," Reuters, Mar. 27, 2008, http://www.reuters.com/article/pressRelease/idUS140283+27-Mar-2008+PRN20080327 (last visited May 5, 2008) (stating that the survey "measures wireless call quality based on seven problem areas that impact overall carrier performance," including dropped calls); *see also* Mergent, Inc., "The North America Telecommunications Sectors: A Company and Industry Analysis," at 5 (November 2007) ("Dropped calls and other glitches caused Sprint to lose about 850,000 long-term contract subscribers in the past year.").

[22] *See also Verizon cut-the-cord survey, supra* note 16 (finding that 94% of respondents cited reliability as their main reason for retaining landline service).

[23] *See* "S&P Cuts Sprint Nextel's Credit to Junk," The Street.com, May 1, 2008, http://www.thestreet.com/newsanalysis/techtelecom/10414729.html (last visited May 5, 2008). Sprint's market share of postpaid subscribers has descreased steadily from 25.3% in the first quarter of 2006 to 22.7% in the fourth quarter of 2007 and it is expected to decline to 19.9% in the fourth quarter of 2008. *See* "US Wireless 411," UBS Investment Research, at 11 (Mar. 18, 2008).

Order ¶ 142. But this does not mean that Sprint-Nextel would necessarily focus its marketing efforts on convincing customers to cut the cord or that, if it did, such efforts would be successful. The Commission did state that non-ILEC affiliated wireless carriers tend to have more customers that cut the cord than ILEC-affiliated mobile wireless carriers (*id.*), but it did not specify the magnitude of the difference. More importantly, there is no basis for concluding that enough customers have cut the cord to prevent a wireline monopolist from unilaterally increasing the price of wireline service.

The Commission pointed to several of Sprint's and Nextel's pre-merger service offerings and promotions as evidence that the companies would effectively increase the level at which customers cut the cord, but none of these appear to have made much of a difference. For example, the Commission noted that Nextel offered a "Campus Unlimited Program," designed to allow customers to use unlimited mobile wireless calling within a corporate or institutional campus. *Id.* n.313. Sprint-Nextel continues to offer this service today,[24] but the service only provides connections *within* a corporate or institutional campus. It does not include any connectivity between the campus itself and the PSTN. It therefore depends on a wireline connection, and could not justify counting subscribers to that service as "cut-the-cord" customers.

In addition, the Commission relied on Nextel's claim that "Nextel's testing of advanced broadband services [] will lead a substantial portion of Nextel's customers to cancel their DSL subscription." *Id.* But there is no evidence that the availability of mobile broadband services has led business customers, of Nextel or any other carrier, to give up their fixed broadband service. As Dr. Mikkelsen points out, there is no reason to think that such substitution would occur given the substantial differences between xDSL and mobile wireless services. *See* Mikkelsen White Paper at 10.

The Commission also cited to the fact that Sprint was the "first carrier to offer E911 Phase II services with a handset-based location technology." *Sprint/Nextel Merger Order* n.313. But according to Verizon's recent survey, the majority of landline phone customers retain landline service in large part because of its dependability and reliability in an emergency.[25] Accordingly, customers do not appear to perceive the E911 service offered by Sprint (and now offered by other mobile wireless carriers) as sufficiently reliable to replace the emergency access calling available on wireline voice lines.

Finally, the Commission also cited to several steps that Sprint and Nextel took to extend wireline voice features to mobile wireless service, such as offering free incoming minutes, unlimited night and weekend calls and reducing overage charges. *See id.* But, again, there is no basis for concluding that these changes had any material effect on customers' perception of

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[24] *See* Sprint Nextel, Custom Network Solutions, http://www.nextel.com/en/solutions/network_security/custom_network.shtml (last visited May 6, 2008) (describing "Campus Unlimited Program")

[25] *See generally Verizon cut-the-cord survey.*